FILED
OCT 3 1942
CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

---

# No. 442

---

PAUL O. BUCKLEY,

*Petitioner,*

*vs.*

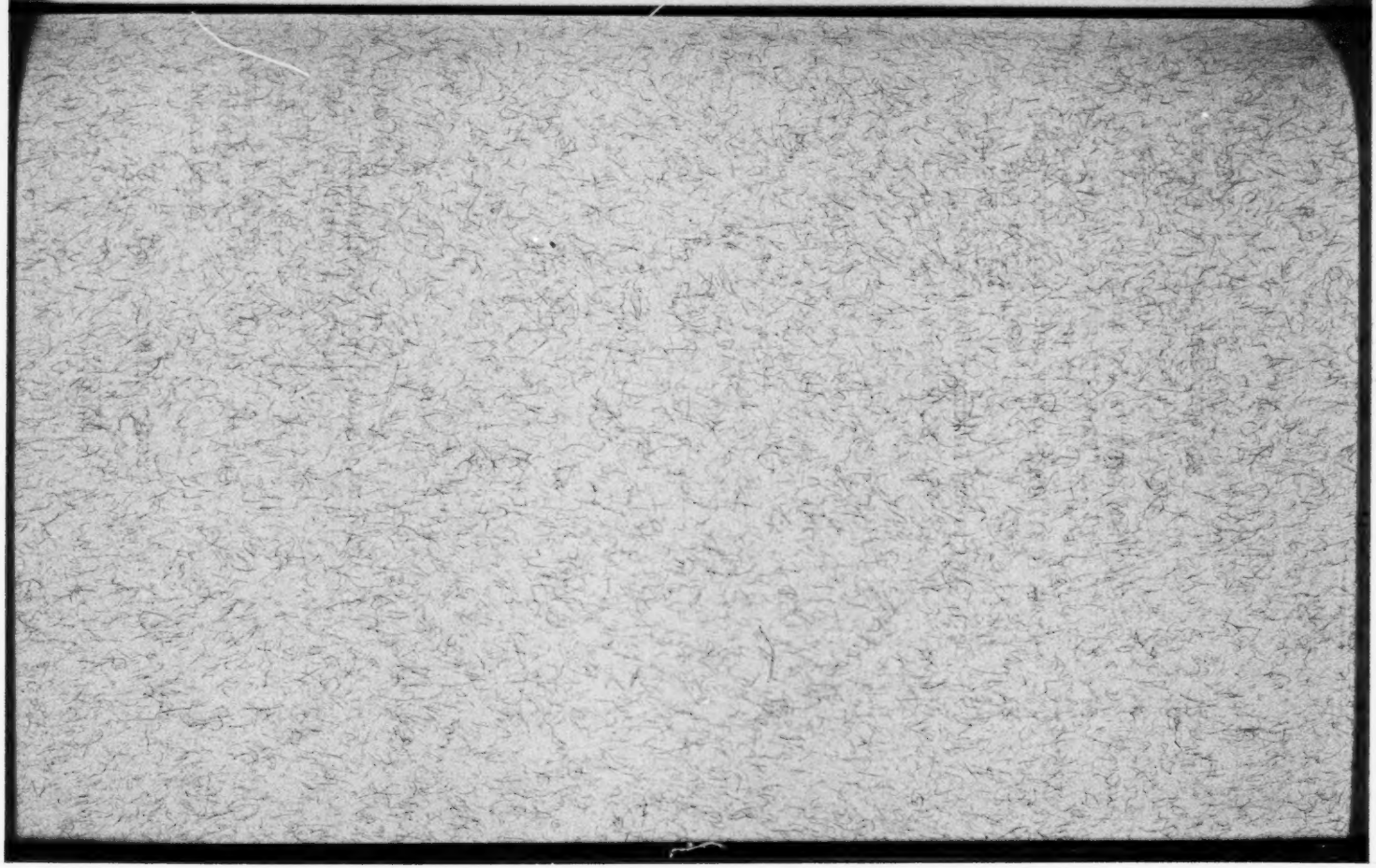
ROSS W. JUDSON.

---

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND SUPPORTING BRIEF.**

---

GORDON DEAN,
BRIEN MCMAHON,
WALTER GALLAGHER,
THOMAS F. CHAWKE,
NATHANIEL W. GOLD,
*Counsel for Petitioner.*



# INDEX.

## Subject Index.


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 2 |
| Question presented | 2 |
| Statute involved | 2 |
| Statement | 2 |
| Reasons for granting the writ | 9 |
| Brief in support of petition for writ of certiorari | 10 |
| Conclusion | 19 |


## Citations.


| | |
|---|---|
| Cases: | |
| *A. C. Frost & Co.* v. *Coeur d'Alene Mines Corp.*, 312 U. S. 38 | 14 |
| *Barnsdall* v. *Owen*, 200 Fed. 219 | 11 |
| *Malloy* v. *New York Life Insurance Co.*, 103 F. (2d) 439 | 12 |
| *McMullen* v. *Hoffman*, 174 U. S. 639 | 11 |
| *Primeau* v. *Granfield*, 193 Fed. 911, certiorari denied, 225 U. S. 708 | 11 |
| *Sage* v. *Hampe*, 235 U. S. 99 | 11 |
| Statutes: | |
| Securities Act of 1933 (48 Stat. 44; 15 U. S. C. § 77p | 16 |
| Sections 11, 12(2), 8(d), 20(b) | 12 |
| Section 5 | 15 |
| Section 24 | 11 |
| Securities & Exchange Act of 1934, 15 U. S. C. § 78cc | 16 |
| 15 U. S. C. §§ 78*l*, 78m, 78o, 78o–3 | 18 |
| Public Utility Holding Company Act of 1935, (15 U. S. C. § 79z) | 17 |
| 15 U. S. C. § 79e | 18 |
| Investment Companies Act of 1940 (15 U. S. C. § 80a–46) | 17 |
| 15 U. S. C. § 80a–8, 80a–24 | 18 |
| Investment Advisors Act of 1940 (15 U. S. C. § 80b–15) | 17 |
| 15 U. S. C. § 80b–3, 4 | 18 |
| Federal Rules Civil Procedure § 52 | 12 |

SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1942**

---

# No. 442

---

PAUL O. BUCKLEY,

*Petitioner,*

*vs.*

ROSS W. JUDSON.

---

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.**

---

Paul O. Buckley prays that a writ of certiorari be issued to review the judgment of the United States Circuit Court of Appeals for the Second Circuit, entered September 8, 1942.

**Opinions Below.**

The report of the Special Master (R. 2439), the findings of fact and conclusions of law of the Special Master (R. 2461), the findings of fact and conclusions of law of the District Court (R. 2541) and the judgment of the Court (R. 2568) are not reported. The opinion of the Circuit Court of Appeals (R. 2588) is not yet reported.

## Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on September 8, 1942. The jurisdiction of this Court is invoked under Sec. 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

## Questions Presented.

1. Whether a secret agreement or arrangement found by the District Court to have been entered into by petitioner and respondent in connection with a public offering of stock for the purpose of deceiving the Securities and Exchange Commission and the public and which agreement or arrangement if carried out would render the representations made in the Registration Statement and Prospectus filed with the Securities and Exchange Commission false, is enforceable in the Courts of the United States.

2. Whether a principal who at the suggestion of an agent enters into a secret agreement or arrangement which is an essential part of a scheme to deceive the Securities and Exchange Commission and the public can enforce such an agreement if the false representations made by the principal and contained in the Registration Statement filed with the Securities and Exchange Commission were not shown to have in fact misled investors to their damage.

## Statute Involved.

Statute involved is the Securities Act of 1933 (48 Stat. 44, 15 U. S. C. Sec. 77a *et seq.*).

## Statement.

This suit was brought by respondent in equity among other things for specific performance of an alleged agreement made by petitioner to sell 18,000 shares of stock of the Bath Iron Works Corporation (hereafter called Bath

Corporation) to respondent at $6.00 per share (R. 24), to compel petitioner to pay respondent one-half of the profits derived from the sale of Bath stock to the public (R. 27) and to compel petitioner to account for certain transactions between them. The case was tried before Honorable Frederick E. Crane as Special Master, who made his report (R. 2439) to the United States District Court for the Southern District of New York, in which he held that the alleged agreement was void and unenforceable. Thereafter judgment was entered on February 19, 1942 (R. 2568) in favor of respondent for $191,622.95 (including interest), dismissing all other claims made by respondent against petitioner, including the claim for specific performance of the alleged agreement relating to the 18,000 shares of Bath stock and respondent's claim for a proportion of petitioner's syndicate profits, and dismissing petitioner's counterclaims.

This petition relates solely to that part of the opinion and decree of the Circuit Court which reverses the judgment of the District Court in dismissing respondent's claim for specific performance of the aforesaid agreement.

In order to have a clear understanding of the alleged agreement relating to the 18,000 shares of Bath stock, it is necessary to set forth here the events leading up to the agreement.

*The Parties.*

The petitioner was an attorney who gave up the practice of law in 1929 to engage in the securities business (R. 2461). In early 1930 respondent who was worth between four and five million dollars, intended to go into the stock market as an investor and speculator. Respondent met petitioner in May 1930 and there developed a close friendship and business relationship (R. 2462). Numerous brokerage accounts belonging to respondent were opened from time to time under the management of petitioner (R. 2463) respond-

ent retaining full control of said accounts in which both petitioner and respondent gave orders (R. 2537).

*Acquisition and Marketing of Bath Stock.*

In 1930 claims for income tax deficiencies were asserted by the Government against respondent which with interest and penalties for alleged fraud ultimately amounted to approximately $900,000 (R. 2464). Prior to 1935 the Government placed a lien on respondent's assets to secure the payment of such sum as might be due and nearly all of respondent's securities were held by the Collector of Internal Revenue at Detroit under this lien (R. 2465, 2590).

In Janunary 1935 respondent proposed to purchase notes and 2750 shares of common stock and 1000 shares of preferred stock of Bath Iron Works Corporation which stock represented control of the Company and was held by the Receiver of the Harriman National Bank as collateral security to an indebtedness of $300,000 (R. 2465). As a result of negotiations by petitioner (R. 2446, 2466), the notes and collateral were purchased for $135,000, in September 1935 with monies borrowed upon respondent's securities which the Collector released for that purpose, receiving the notes and Bath stock collateral thereto in substitution therefor (R. 2466, 2590). In January 1936, respondent purchased the 2750 shares of common stock and 1000 shares of preferred stock of the Bath Corporation at the foreclosure of the pledge, which stock continued to be held by the Collector under Government lien (R. 2466-7).

In March 1936 respondent bought out the interest of one Harbeck in the deal, and about the same time gave petitioner 25% interest in the Bath deal and stock in return for services and for which stock petitioner was to pay (R. 2467). Petitioner was to make the arrangements for selling the stock and carry on the negotiations with the

bankers (R. 2467). The arrangement according to the respondent between them with respect to the purchase of the stock was that they would participate in the cost and expenses as well as sales of the same upon a basis of 25% to petitioner and 75% to respondent (R. 2491).

In June 1936 the Bath stock which was in the possession of the Collector was transferred from the name of the Receiver of the Harriman National Bank, and new certificates were issued in lieu thereof, 25% in the name of petitioner and 75% in the name of respondent. Petitioner and respondent endorsed their respective certificates in blank and returned them to the Collector to be held under the Government lien (R. 2467-8).

Petitioner then enlisted the aid of Allen Melhado to carry on the negotiations and formulate a plan for marketing the stock. Through the negotiations of petitioner and Melhado, a recapitalization of the Bath Corporation and sale of the stock was proposed (R. 2468). The company was recapitalized on August 13, 1936 (R. 2469) as a result of which respondent became entitled to receive and did receive 133,837½ shares of new stock in exchange for the old stock then registered in respondent's name and petitioner became entitled to receive and did receive 44,612½ shares of new stock for the old stock then registered in petitioner's name (R. 2447, 2470) all of which remained subject to the Government lien.

Pursuant to the market arrangements, Hemphill, Noyes & Co. were to underwrite the purchase of 50,000 shares of new stock to be issued by the company and to market an additional 144,000 shares derived from the stockholders (R. 2469). Petitioner had obtained options from respondent and a group headed by Newell, the president of the company, covering a total of 144,000 shares whereby he was given the option to purchase their stock at $6.00 a shares (R. 2591). He then assigned these options to Hemphill, Noyes & Co. to carry out the marketing. The latter was to

pay $10.00 a share for the 50,000 shares and $6.00 a share for the 144,000 shares covered by the option. The 144,000 shares were to consist of 72,000 shares optioned to petitioner by the respondent and 72,000 shares optioned to petitioner by the minority stockholders headed by Newell and who were termed the "management group". The price to the public was $12.00 a share (R. 2468). Of the 144,000 shares, 25,000 were to be sold for the account of Hemphill, Noyes & Co. The six dollar underwriting profit on the remaining 119,000 shares was to be divided as follows: $1.00 per share to the bankers, commissions of 42¢ a share to Allen Melhado, and the balance divided between Hemphill, Noyes & Co. and Petitioner (R. 2468, 2591). These arrangements were carried out and fully disclosed in the registration statement filed with the Securities and Exchange Commission, pursuant to the Securities Act of 1933 (R. 2469).

The 72,000 shares to be sold by respondent were released by the Collector for that purpose, the proceeds to be used to satisfy his lien (R. 2004) and said shares, together with the remaining 72,000 shares optioned to petitioner, were deposited, pursuant to the Option Agreement (R. 2324), in escrow for delivery to the underwriters upon payment therefor (R. 2190-91). The remaining 61,837½ shares owned by respondent and the 44,612½ shares owned by petitioner were deposited, with the consent of the Collector and subject to his lien, with the principal underwriter, to be held in safekeeping for a period of one year, pursuant to the terms of a Safekeeping Agreement (R. 2332-3).

*The Contract in Question.*

Before the registration statement was filed, however, petitioner according to the findings told respondent that because he, petitioner, held options on 144,000 shares he could not sell any of his own stock "because under the laws of the S. E. C. you cannot do that" and that respondent

was to sell 18,000 shares of his stock for petitioner which petitioner would reimburse and return to respondent later on at $6 per share. Petitioner further told respondent that in addition to the $6.00 per share respondent would receive $2.00 or $3.00 per share from the syndicate (R. 2453-4, 2469). This arrangement was denied by petitioner but was found by the Court to have been entered into between petitioner and respondent (R. 2457). In any event it was not disclosed in the registration statement. On the contrary, the statement falsely declared that the petitioner who was deemed to be an underwriter, owned 44,612½ shares, none of which were to be sold, that the stockholders, including petitioner, had agreed not to sell any of their stock except that offered in the option agreement during the life of the option agreement, and that respondent was selling 72,000 shares of his own stock for which he was to receive $6.00 a share (R. 2592).

*Findings*[1] *of the District Court.*

The District Court found that the registration statement and the agreements signed by respondent in connection with the preparation thereof were false (R. 2455, 2473, 2479); that the arrangement between petitioner and respondent respecting 18,000 shares and the syndicate profits was entered into between them for the purpose of (1) concealing petitioner's interest in the stock to be offered for sale, (2) inducing more people to buy the securities if the arrangements were not revealed, and (3) make possible the deal for double profits which, it was feared might not be permitted if known; that the concealment of the true facts and the false representations in the registration statement filed with their knowledge and consent were in violation of the Act (R. 2541-2).

---

[1] These findings include the findings of the Special Master confirmed by the District Court (R. 2544).

The District Court found further that the secret agreement or arrangement as to the 18,000 shares, the splitting of the underwriting profits and the false representations were all part of a scheme to deceive the Securities and Exchange Commission and the public; that it would be encouraging deceit and contrary to public policy for the Court to lend its aid in carrying out a conspiracy of this character; that the arrangement or agreement was an essential part of a scheme that was illegal and entered into for improper purposes (R. 2542). The District Court also found that respondent and petitioner were "experienced manipulators"; that the contracts between them were made for the purpose of concealing the fact that petitioner had an interest in the sale of the stock and as an aid to the falsification of the registration statement and were entered into by them to circumvent the rules and regulations of the Securities and Exchange Commission; that the method and reasons were discussed by them; that what was done by respondent was done deliberately and purposely, and that if there be any conflict between the application of the rule for the protection of a fiduciary relationship and the rule holding illegal contracts unenforceable the latter rule should prevail under the circumstances here presented (R. 2543-44).

*Opinion of the Circuit Court.*

The Circuit Court in an opinion by Judge Augustus N. Hand overruled the Special Master and the District Court and held that respondent was entitled to a decree requiring petitioner to transfer to him the 18,000 shares of the Bath stock and concluded that respondent's claim for the syndicate's profits had been satisfied and must be dismissed. In its opinion the Circuit Court held that the errors in the registration statement could not mislead prospective purchasers as to the value of the stock or really prejudice

them in any way (R. 2593); that while the accuracy and propriety of the statements petitioner and respondent made may not be defended it seemed necessary to consider the position in which respondent stood before depriving him of his contract right; that respondent was in a position of a person having nothing to gain by any errors in the registration statement and that so far as he had any share in them he had it because of the guidance of petitioner who was his agent and confidential adviser; that a sound public policy would not be promoted by depriving a principal of the right to hold his agent accountable in situations like the present (R. 2594); and that no misstatements were made to the Commission in respect to matters which might mislead investors to their damage (R. 2595).

**Reasons for Granting the Writ.**

1. There is involved here an important question of Federal law which has not been but should be settled by this Court.

2. There is involved here an important question in the administration of the Securities Act of 1933 which it is in the public interest to have decided.

3. The Circuit Court has decided an important question of Federal law in a way probably in conflict with applicable decisions of this Court and with the weight of authority.

4. Because it is a matter of public importance to know whether or not the Courts of the United States will enforce agreements or arrangements which are essential parts of a scheme to deceive Governmental agencies and the public.

5. The Courts below in this case have come to opposite conclusions and differ as to the legal effect of the agreement or arrangement entered into between the petitioner and respondent.